

## SCC's *Lundin* Decision Signals Broad, Contextual Approach to "Material Change"

By *Mardi McNaughton*

On November 28, 2025, the Supreme Court of Canada (**SCC**) released its long-anticipated decision in [\*Lundin Mining Corp v Markowich\*](#) (**Lundin**), offering significant guidance on the interpretation of "material change" under Canadian securities law.

### Background

As discussed in our earlier [article](#), securities law distinguishes between material facts and material changes. A material change occurs when there is a change in the issuer's business, operations, or capital that would reasonably be expected to have a significant effect on the market price or value of its securities.<sup>1</sup> A material fact, on the other hand, is any fact that that would reasonably be expected to have a significant effect on the market price or value of its securities.<sup>2</sup> While material facts may be disclosed through periodic reporting, material changes trigger an obligation of immediate public disclosure.

In *Lundin*, a mining company (**Lundin**) detected instability in a pit wall at one of its operations. Six days later, the unstable wedge failed, causing a rockslide that halted production. Lundin did not disclose the incident until a month later. When the disclosure was made, the company's share price dropped 16% in a single day, erasing approximately \$1 billion in market capitalization.

The plaintiff (**Markowich**) sought leave to commence a class action on behalf of shareholders who purchased Lundin securities between the date of the rockslide and the date of disclosure. He alleged that Lundin and its officers and directors had breached their timely disclosure obligations. The motion judge dismissed the application, but the Ontario Court of Appeal reversed the decision, finding the lower court's approach overly rigid.

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<sup>1</sup> Ontario *Securities Act*, RSO 1990, c S.5, s. 1. As noted in *Lundin* at para 43, similar definitions are contained in securities legislation across Canada: *Securities Act* (B.C.), s. 1(1); *Securities Act* (Alta.), s. 1(ff); *The Securities Act*, 1988 (Sask.), s. 2(1)(y); *The Securities Act* (Man.), s. 1(1); *Securities Act* (Que.), s. 5.3; *Securities Act* (N.B.), s. 1(1); *Securities Act* (N.S.), s. 2(1)(v); *Securities Act* (P.E.I.), s. 1(1)(ff); *Securities Act* (N.L.), s. 2(1)(w); *Securities Act* (N.W.T.), s. 1(1); *Securities Act* (Yukon), s. 1(1); *Securities Act* (Nu.), s. 1(1).

<sup>2</sup> Ontario *Securities Act*, RSO 1990, c S.5, s. 1. As above, similar definitions are contained in securities legislation across Canada.

## SCC's Decision

The SCC largely upheld the Court of Appeal's ruling. The central question before the SCC was whether Markowich should be granted leave to pursue an action against Lundin and its officers and directors for the alleged failure to promptly disclose a material change. In reaching its decision, the SCC organized its analysis into three key components:

1. **Statutory Interpretation:** Clarifying the meaning of "material change" in the business, operations, or capital of a reporting issuer under the *Securities Act*.
2. **Test for Leave under s. 138.8(1):** Assessing whether, as the Court of Appeal suggested, the concept of "material change" should be applied with greater flexibility at the leave stage.
3. **Application to the Facts:** Applying these principles to the circumstances surrounding Lundin's disclosure delay.

### Statutory Interpretation of "Material Change"

In determining whether the incident constituted a material change, the motion judge relied on a dictionary definition of "change" and referenced case law to define "business", "operations", and "capital". The Ontario Court of Appeal found this approach overly restrictive and the SCC agreed.

The SCC emphasized foundational principles of continuous disclosure: issuers must provide investors with sufficient information to make informed decisions, while avoiding disclosure practices that overwhelm the market with immaterial details. Striking this balance requires flexibility, not rigidity.

There is no bright-line test for determining the difference between a material fact and a material change. The legislature deliberately left key terms undefined to allow the concept to adapt to diverse factual contexts. To illustrate the distinction between material fact and material change, the SCC highlighted several guiding principles:

- **Static vs. Dynamic:** A material fact is a snapshot in time; a material change involves a before-and-after comparison.
- **Scope:** Material facts are broadly defined; material changes are limited to changes in an issuer's business, operations, or capital.
- **Internal vs. External:** Material changes are internal to the issuer; material facts may be internal or external.

- **Beyond Negotiations:** Mere discussions or internal deliberations generally do not amount to a material change even if they are material; the change must have actually occurred.

Applying these principles, the SCC found three key errors in the lower court's reasoning:

1. **Overreliance on Dictionary Definitions:** The motion judge failed to interpret "change" in its statutory context, ignoring the legislature's intent to leave the term undefined for flexible application.
2. **Collapsing Two Steps into One:** By requiring a change to be "important and substantial", the judge conflated the existence of a change with its materiality, undermining the two-step analysis.
3. **Restrictive Definitions of Undefined Terms:** The judge imported narrow judicial definitions of "business, operations, or capital", contrary to the legislature's intent to preserve ordinary commercial meaning.

The SCC agreed with the Court of Appeal that "a change is a change". While dictionary definitions may assist in interpretation, they cannot override legislative intent. The SCC clarified that a development need not be "important and substantial" to qualify as a change; the magnitude of the development is assessed at the materiality stage of the analysis.

Finally, the SCC cautioned against imposing rigid definitions on terms intentionally left open-ended in the *Securities Act*. Doing so would undermine the purpose of continuous disclosure obligations: addressing informational asymmetries between issuers and investors.

### ***Securities Act* Test for Leave**

Under the *Securities Act*, leave to proceed with an action for failure to disclose may be granted where there is "a reasonable possibility that the action will be resolved at trial in favour of the plaintiff".<sup>3</sup>

The SCC reviewed the evolution of Canada's secondary market disclosure regime, including significant reforms in the early 2000s that introduced a statutory cause of action for non-disclosure, coupled with a screening mechanism requiring plaintiffs to obtain

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<sup>3</sup> A plaintiff must also demonstrate that the action was brought in good faith. This requirement was not in dispute in this case.

leave before commencing such actions. This mechanism was designed to deter unmeritorious claims while preserving access to justice for investors.

The SCC clarified the nature of this preliminary merits test. Courts must determine whether the claim has a reasonable or realistic chance of success, not whether success is probable on a balance of probabilities. Meeting this threshold requires the plaintiff to present:

1. A plausible interpretation and application of the relevant legislative provisions, and
2. Credible evidence supporting the claim.

The SCC emphasized that this is a relatively low merits-based threshold. It does not demand proof of success but rather a realistic prospect that the claim could succeed. As the SCC noted, "statutory interpretation is not conducted less stringently on a leave motion than at trial". The plaintiff must demonstrate a plausible application of the law based on the limited evidence available at this early stage.

### **Application to the Facts at Hand**

The SCC found that the motion judge erred in his interpretation of what constitutes a "change" in an issuer's business, operations, or capital. By relying heavily on dictionary definitions and restrictive case law, and by requiring a development to be "important and substantial" before assessing materiality, the judge applied an unduly narrow approach. As a result of this interpretation, the motion judge concluded that neither the pit wall instability nor the subsequent rockslide amounted to a change in Lundin's affairs. He reasoned that Lundin maintained its ability to operate, its economic viability was never in question, and its mining activities continued, albeit with some adjustments. He also suggested that additional expenditures alone do not necessarily signal a material change to capital. However, the SCC clarified that none of these factors are prerequisites for finding a material change.

The SCC agreed with the Court of Appeal that, had the correct interpretation been applied, there was a reasonable possibility that the plaintiff could establish that these events resulted in a change to Lundin's operations. The motion judge himself acknowledged that the events could potentially be material at trial and accepted that both parties' expert evidence was credible, noting that weighing competing expert opinions is not appropriate at the leave stage.

Further, Lundin provided no direct evidence regarding the impact of the shutdown, such as whether other areas of the mine were affected or whether operations were curtailed

beyond the open pit. This type of evidence would likely emerge during discovery. Importantly, uncontested evidence showed that the instability and rockslide forced Lundin to revise production forecasts downward by approximately 20% for the next year, process lower-grade ore, and alter the mine's phasing – all indicators of operational change.

On this basis, the SCC concluded that there was a reasonable possibility the plaintiff could succeed at trial in proving that Lundin failed to disclose material changes as required. Accordingly, the SCC concluded that leave should have been granted under s. 138.8(1) of the *Securities Act* to pursue the claim.

### **Dissenting Opinion**

Justice Côté issued a substantial dissent – longer than the majority's reasons – expressing strong agreement with the motion judge's approach. In her view, the interpretation of "material change" adopted by the Court of Appeal and affirmed by the SCC majority risks blurring the clear distinction between "material fact" and "material change" established by the legislature. She cautioned that this broader interpretation could lead to uncertainty, over-disclosure, and premature disclosure by issuers seeking to avoid liability exposure.

### **Takeaways**

This decision reinforces the need for issuers to conduct a careful, fact-specific analysis whenever an event could constitute a material change. Timely disclosure obligations remain a critical compliance area, and missteps can result in significant liability.

For guidance on navigating these obligations, please contact any member of our [Business Law](#) group.